

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ERIC CHRISTENSEN,

Defendant.

CASE NO. CR18-5411 BHS

ORDER DENYING
DEFENDANT'S MOTION FOR
COMPASSIONATE RELEASE

This matter comes before the Court on Defendant Eric Christensen's ("Christensen") motion to reduce sentence re Section 404 of the First Step Act. Dkt. 39. The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby denies the motion for the reasons stated herein.

I. PROCEDURAL AND FACTUAL BACKGROUND

On July 23, 2018, the Government filed a complaint against Christensen alleging a count for possession of methamphetamine with intent to distribute and a count for possession of heroin with intent to distribute. Dkt. 1. On July 24, 2018, Magistrate Judge Karen Strombom ordered Christensen detained pending trial. Dkt.

1 10. On August 2, 2018, the Government filed an indictment wherein a grand jury
2 charged Christensen with the same two counts listed in the complaint. Dkt. 12. On
3 December 17, 2018, Christensen plead guilty to both charges. Dkt. 23.

4 On April 29, 2019, the Court sentenced Christensen to sixty months of
5 incarceration followed by four years of supervised release. Dkt. 35.

6 On June 15, 2020, Christensen filed the instant motion for compassionate
7 release. Dkt. 39. Christensen, age 59, seeks compassionate release based on his
8 stage III kidney disease and lingering health issues related to his contracting and
9 recovery from COVID-19. On June 19, 2020, the Government responded opposing
10 release. Dkt. 44. On June 26, 2020, Christensen replied. Dkt. 47.

11 On July 6, 2020, the Court requested supplemental responses on certain
12 issues. Dkt. 49. On July 8, 2020, the Government filed a supplemental response,
13 Dkt. 50, a motion to seal an exhibit attached to the response, Dkt. 51, and the
14 exhibit under seal, Dkt. 52. On July 13, 2020, Christensen filed a supplemental
15 reply. Dkt. 53. On July 16, 2020, Christensen filed a notice of additional authority.
16 Dkt. 54.

17 On August 14, 2020, the Court granted the Government's motion to seal and
18 requested a status report as to Christensen's status as a class member in *Torres v.*

1 *Milusnic*, Case No. 20-4450-CBM-PVC(x), 2020 WL 4197285 (C.D. Cal. July 14,
2 2020).¹ On August 21, 2020, the parties filed a joint status report. Dkt. 57.

3 II. DISCUSSION

4 Pursuant to 18 U.S.C. § 3582(b), a judgment of conviction that includes a
5 sentence of imprisonment “constitutes a final judgment and may not be modified
6 by a district court except in limited circumstances.” *Dillon v. United States*, 560
7 U.S. 817, 824 (2010) (internal quotations omitted). Those limited circumstances are
8 provided under 18 U.S.C. § 3582(c)(1)(A)(i). Effective December 21, 2018, the
9 First Step Act of 2018 amended § 3582(c)(1)(A) by adding a provision that allows
10 prisoners to directly petition a district court for compassionate release:

11 (A) the court, upon motion of the Director of the Bureau of
12 Prisons, or upon motion of the defendant after the defendant has fully
13 exhausted all administrative rights to appeal a failure of the Bureau of
14 Prisons to bring a motion on the defendant’s behalf or the lapse of 30
15 days from the receipt of such a request by the warden of the
16 defendant’s facility, whichever is earlier, may reduce the term of
17 imprisonment (and may impose a term of probation or supervised
18 release with or without conditions that does not exceed the unserved
19 portion of the original term of imprisonment), after considering the
20 factors set forth in section 3553(a) to the extent that they are
21 applicable, if it finds that—

22 (i) extraordinary and compelling reasons warrant such a
reduction;

and that such a reduction is consistent with applicable policy
statements issued by the Sentencing Commission;

1 ¹ *Torres* is a related habeas matter in the Central District of California concerning a
class of inmates housed at Federal correctional Institution in Lompoc, California (“FCI
Lompoc”), which is where Christensen is currently housed. *See* Dkt. 55.

1 18 U.S.C. § 3582(c)(1)(A). Accordingly, a court may reduce a sentence upon
 2 motion of a defendant provided that: (1) the inmate has either exhausted his or her
 3 administrative appeal rights of the Bureau of Prison's ("BOP") failure to bring such
 4 a motion on the inmate's behalf or has waited until 30 days after the applicable
 5 warden has received such a request; (2) the inmate has established "extraordinary
 6 and compelling reasons" for the requested sentence reduction; and (3) the reduction
 7 is consistent with the Sentencing Commission's policy statement. *See id.*

8 The Sentencing Commission's policy statement referenced in 18 U.S.C.
 9 § 3582(c)(1)(A)(i) provides, in relevant part:

10 [T]he court may reduce a term of imprisonment (and may
 11 impose a term of supervised release with or without conditions that
 12 does not exceed the unserved portion of the original term of
 13 imprisonment) if, after considering the factors set forth in 18 U.S.C. §
 14 3553(a), to the extent that they are applicable, the court determines
 15 that—

16 (1)(A) Extraordinary and compelling reasons warrant the
 17 reduction;

18 ***

19 (2) The defendant is not a danger to the safety of any other
 20 person or to the community, as provided in 18 U.S.C. § 3142(g); and

21 (3) The reduction is consistent with this policy statement.

22 United States Sentencing Guidelines ("USSG") § 1B1.13.

The Court here focuses on whether Christensen has extraordinary and
 compelling reasons to warrant the reduction of his sentence. Recently, Judge
 Thomas S. Zilly has provided a non-exhaustive list of factors federal courts have
 considered in determining whether a defendant has extraordinary and compelling
 reasons for compassionate release in the context of COVID-19:

(i) whether the inmate is at higher risk because of his or her age and/or race, *see United States v. Young*, No. CR19-5055 BHS, 2020 WL 2614745, at *3 (W.D. Wash. May 22, 2020); (ii) whether the inmate has one or more, medically-documented, chronic health conditions that render him or her more vulnerable to COVID-19, *see United States v. Locke*, No. CR18-0132 RAJ, 2020 WL 3101016, at *4 (W.D. Wash. June 11, 2020) (observing that the movant's health issues were “not merely self-diagnosed,” but rather “medically documented and verified”); *United States v. Rodriguez*, No. 2:03-cr-00271-AB-1, 2020 WL 1627331, at *7 (E.D. Pa. Apr. 1, 2020) (inmate with type 2 diabetes, obesity, hypertension, and liver abnormalities was in a “higher risk category”); (iii) the fatality rate for individuals with similar health conditions as compared with the overall fatality rate for COVID-19, *see id.* (summarizing COVID-19 fatality rates); *United States v. Pippin*, No. 16-0266, 2020 WL 2602140, at *1 (W.D. Wash. May 20, 2020) (granting a motion brought by a defendant suffering from pancytopenia, which is associated with an “over fivefold enhanced risk of severe COVID-19”); (iv) whether the inmate has previously tested positive for the coronavirus that causes COVID-19 and, if so, whether the inmate suffers from any long-term effects of the disease, *see United States v. Reynolds*, No. 2:18-cr-00131-RAJ, 2020 WL 3266532, at *3–4 (W.D. Wash. June 17, 2020) (denying a motion for compassionate release brought by an inmate who recovered from and was “not suffering from any reported lingering symptoms” related to COVID-19); and (v) whether the inmate's release is expected to reduce the risk of him or her contracting COVID-19, *see United States v. Sandoval*, No. CR14-5105RBL, 2020 WL 3077152, at *5 (W.D. Wash. June 10, 2020) (declining to release a defendant to a situation that “would likely place him at greater risk”).

United States v. Grubbs, No. CR16-228 TSZ, 2020 WL 3839619, at *2 (W.D. Wash. July 8, 2020).

The Court finds these factors useful and instructive and consistent with the analysis of extraordinary and compelling reasons the Court has engaged in with recent COVID-19 cases. *See, e.g., Young*, 2020 WL 2614745 at *3 (a 64-year-old African American defendant who suffers from hypertension and chronic kidney disease presented extraordinary and compelling reasons); *United States v. Lint*, No. CR18-5152 BHS, 2020 WL 4698815, at *2 (W.D. Wash. Aug. 13, 2020) (a

defendant housed at a federal correctional institution that had only two inmates infected with COVID-19 did not present an extraordinary and compelling reason); *United States v. Gray*, No. CR16-5600 BHS, 2020 WL 5759792, at *2–3 (W.D. Wash. Sept. 28, 2020) (a relatively young female defendant with a Body Mass Index of 32.1, while obese, did not present sufficient evidence of extraordinary and compelling reasons without additional evidence of other risk factors). The Court will exercise its discretion and consider the factors provided by Judge Zilly to determine whether Christensen has extraordinary and compelling reasons.²

Here, the parties agree that Christensen’s chronic kidney disease is “extraordinary and compelling.” Dkt. 53 at 2. The CDC has classified chronic kidney disease as a condition that can increase the risk for severe illness from COVID-19.³ Having a documented medical condition that the CDC considers a

² In the application of USSG § 1B1.13, the Commission has described three categories of potentially “extraordinary and compelling reasons,” namely medical condition, age, and family circumstances, *see* USSG § 1B1.13 cmt. n.1(A)–(C), as well as a “catch-all” provision, *id.* cmt. n.1(D), which “opens the door” to considering factors other than those specifically enumerated, *United States v. McPherson*, 454 F. Supp. 3d. 1049 (W.D. Wash. 2020). However, USSG § 1B1.13 has not been updated since the passage of the First Step Act of 2018, and district courts have largely found that the Commission’s list of extraordinary and compelling reasons is not binding, but rather helpful guidance. *See United States v. Almontes*, No. 3:05-cr-58 (SRU), 2020 WL 1812713, at *3 (Apr. 9, 2020 D. Conn.) (providing a list of cases from around the country on whether the Commission’s list is binding). The Court therefore concludes that, given the “catch-all” provision and the non-binding status of the comments to USSG § 1B1.13, it has discretion to construe the meaning of extraordinary and compelling reasons. *See Grubbs*, 2020 WL 3839619, at *2 n.2.

³ Center for Disease Control and Prevention, *People with Certain Medical Conditions*, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F

1 risk for severe illness is a factor in favor of finding extraordinary and compelling
2 reasons to warrant Christensen's compassionate release. However, Christensen has
3 already been diagnosed with COVID-19. Dkt. 39. As of June 11, 2020, Christensen
4 reported that he was feeling somewhat better, but still had lingering side effects,
5 including "continued fatigue, limited energy to exercise, reduced lung capacity"
6 and "sore throat." *Id.* at 8. However, there is no information in the record indicating
7 that Christensen suffers from any long-term effects of the disease. Indeed,
8 Christensen agrees with the Court's assessment that he "has recovered to a certain
9 extent[.]" Dkt. 53 at 2 (quoting Dkt. 49 at 1). While there is a documented first
10 instance a recovering COVID-19 patient has become reinfected in the United
11 States,⁴ Christensen has failed to provide scientific evidence that he remains
12 reasonably susceptible to reinfection. The Court understands that the scientific
13 community's understanding of the virus is evolving, and it may be possible that
14 new scientific evidence will emerge as to reinfection. At this time, because
15 Christensen has already been infected, his chronic kidney disease alone does not
16 amount to an extraordinary and compelling reason to warrant compassionate
17 release.

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20 2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html (last updated Oct. 6,
2020).

21 ⁴ Erika Edwards & Akshay Syal, *COVID-19 reinfection reported in Nevada*
22 *patient, researchers say*, NBC News (Aug. 28, 2020)
<https://www.nbcnews.com/health/health-news/covid-19-reinfection-reported-nevada-patient-researchers-say-n1238679>.

1 **III. ORDER**

2 Therefore, it is hereby **ORDERED** that Christensen's motion for
3 compassionate release, Dkt. 39, is **DENIED** without prejudice.

4 Dated this 8th day of October, 2020.

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7 BENJAMIN H. SETTLE
8 United States District Judge
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